



STATE OF INDIANA

MICHAEL R. PENCE, Governor

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January 5, 2016

Mr. Robert Holleman - #10067
Pendleton Correctional Facility
4490 West Reformatory Road
Pendleton, Indiana 46064

Re: Formal Complaint 15-FC-274; Alleged Violation of the Access to Public Records Act by the Pendleton Correctional Facility (Amended)

Dear Mr. Holleman:

This advisory opinion is in response to your formal complaint alleging the Pendleton Correctional Facility ("Facility") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The Facility responded to your complaint via Ms. Penny Eden, Administrative Assistant. Her response is enclosed for your review.¹ Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on October 14, 2015. This Opinion has been amended.

BACKGROUND

Your complaint alleges the Pendleton Correctional Facility violated the Access to Public Records Act by improperly denying your request.

On October 2, 2015, you requested documents showing how many persons incarcerated at Pendleton are infected with the Hepatitis C virus. You are seeking any records prepared or for the Facility. You specifically stated you do not want confidential medical records or any prisoner names.

According to a written denial from the Facility, your request was denied by Facility staff as you are not entitled to information about other offenders, the information may compromise facility security, HIPAA

¹ Due to an administrative oversight, the wrong complaint was sent to the General Counsel of the Department of Correction. The complaint should have gone to the Facility itself and this Office takes responsibility for the error – a personnel shortage left an institutional gap regarding how inmate complaints are processed. In the interest of fairness, I have provided the Facility an opportunity to respond and have amended this Opinion accordingly.



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law and because Corizon (the Facility's health care contractor) is a private entity not subject to the APRA.

On January 4, 2016 the Facility responded. Ms. Eden reasserts the original denial. Ms. Eden also contends data related to the number of inmates with Hepatitis C would lead to fear on the part of the offenders, visitors and the surrounding community. This, she asserts would cause an issue for facility security and would therefore mean the records are nondisclosable under the APRA.

ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." See Ind. Code § 5-14-3-1. Pendleton Correctional Facility is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the Facility's disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

The Facility does not dispute the records you have requested are public records. Rather, the Facility argues the records are exempt from disclosure due to the Department of Correction ("DOC") administrative rules. The APRA states a public agency "may not" disclose records "declared confidential by rule adopted by a public agency under specific authority to classify public records as confidential granted to the public agency by statute." Ind. Code § 5-14-3-4(a)(2). Under Ind. Code § 11-8-5-2(a), the Department of Correction may classify as confidential information maintained on a person who has been committed to the Department. Pursuant to this authority, the DOC has classified several categories of documents as "confidential information," including information relating to offender diagnostic/classification reports; information which, if disclosed might result in physical harm to that person or other persons; and internal investigation information. 210 I.A.C. 1-6-2(3)(A), (C), (G). The IDOC cited each of these exemptions when it rejected your request. Similarly, the Facility invokes Ind. Code § 5-14-3-4(b) as an exemption to disclosure. It states that certain information maintained by the Facility which concerns or could affect the security for a jail or correctional facility may be withheld.

While many of these terms are not defined, it is my opinion that the raw data of a communicable disease burden in a prison facility would not fall under any of these categories. It is conceded security of the facility and inmate safety are of utmost importance, however, the Facility has not provided a compelling reason as to why infectious disease data is a threat. Aggregate public health data of prisons seems to be quite innocuous in terms of risk to prisoners or staff.



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Furthermore, under the Health Insurance Portability and Accountability Act, the United States Health and Human Services ("HHS") has adopted Standards for Privacy of Individually Identifiable Health Information, 45 CFR Parts 160 and 164 ("HIPAA" or "Privacy Rule"). Under HIPAA, covered entities are required to conform to the Standards for Privacy. In summary, a covered entity must not disclose protected health information without a valid authorization from the subject of the health information, except as provided in the Privacy Rule. See 45 CFR §164.502. Again, you are seeking raw data and not an individual's health record; therefore, HIPAA's prohibition against the disclosure of personally identifiable health information would not apply. The Privacy Rule is only implicated when individuals could potentially be identified or data extrapolated to associate the data with carriers.

Finally, the Facility posits that Corizon Correctional Health Care is the custodian of the records you seek. Therefore, Indiana's public access laws ostensibly do not apply to them. This is true to an extent. While the mere fact a private entity has a contract with a public agency does not expose all of its records to disclosure, certain records germane to the contract would be public record as if they were maintained by the public agency itself. For example, if Corizon was directed by the DOC to collect and maintain data on infectious disease, then any reports generated by Corizon under that particular directive would be potentially disclosable public record. In any event, I am not personally aware of any public health or accrediting body which would mandate the collection of that data. If there is, the Court of Appeals in *Knightstown Banner, LLC v. Town of Knightstown*, 838 N.E.2d 1127, 1131 (Ind. Ct. App. 2005) discussed this issue at length and came to the conclusion government entities cannot conceal public records by delegating a public duty to a private entity.

RECOMMENDATION

To the extent any such aggregate data reports exist in the direct or constructive custody of the Facility, it is the Opinion of the Public Access Counselor they should be released to you.

Regards,



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A handwritten signature in black ink, appearing to read "LH Britt", is positioned above the printed name and title.

Luke H. Britt
Public Access Counselor

Cc: Ms. Penny Eden